

Supreme Court, U.S.

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No. 89-670

IN THE
Supreme Court of the United States

October Term, 1989

LARRY ZAPP, et. al.,

Petitioners,

v.

UNITED TRANSPORTATION UNION,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, United Transportation Union, respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit Court's opinion in this case. That opinion is reported at 879 F.2d 1439.

QUESTIONS PRESENTED FOR REVIEW

Respondent finds the Petitioners' statement of the Questions Presented for Review to be vague and misleading. Respondent respectfully suggests that the only issue before this Court is as follows:

Whether the Seventh Circuit correctly affirmed a District Court ruling that a union defendant is entitled to summary judgment under the six-month statute of limitations for breach of duty of fair representation where the collective bargaining agreements complained of by the union member plaintiffs were signed December 18, 1975, and Plaintiffs did not file suit until July 12, 1977, where:

- (a) The representatives of the plaintiffs received – copies of the agreements prior to September 1, 1976;
- (b) Defendant did not mislead the plaintiffs as to the existence of the agreements and at no time promised the plaintiffs that it would seek alteration of the agreements on behalf of the plaintiffs;
- (c) The plaintiffs failed to exhaust their internal union remedies or prove futility prior to filing suit against the union defendant.

STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings, and Disposition of Court Below

Petitioners' Fourth Amended Complaint consisted of a two-count cause of action against the United Transportation Union (hereinafter "Respondent", "UTU" or "Union") for breach of duty of fair representation alleging improper negotiation of two collective bargaining agreements by the Union with Conrail. The two agreements were signed by Conrail and the UTU on December 18, 1975.

Petitioners, all former employees of the Indianapolis Union

Railway Company ("IU"), filed their original Complaint with the Southern Indiana District Court on July 12, 1977. After the Court granted Petitioners three opportunities to amend their Complaint, the District Court on motion of Defendants (UTU and Conrail) dismissed Petitioners' Third Amended Complaint. This decision was appealed to the Seventh Circuit, which, in a decision of that court released on February 6, 1984, affirmed in part, reversed in part, and remanded in part the district court's decision. *Zapp v. United Transportation Union*, 727 F.2d 617 (7th Cir. 1984) ("*Zapp I*"). Petitioners incorrectly cite *Zapp I* for the proposition that they "did have a cause of action against Respondent." (Petitioners' Petition for Writ of Certiorari, hereinafter "Petitioners' Brief," p. 5) Instead, the Seventh Circuit merely stated that the Petitioners had "adequately alleged hostile discrimination" in their third amended complaint to avoid dismissal pursuant to Fed. R. Civ. P. 12(b)(6). (Petitioners' Appendix, hereinafter "A". 49).

After remand to the United States District Court, Petitioners petitioned the ICC for an order of clarification concerning the Indianapolis Union Railway Company's ("IU") employees' rights as to the 1968 Penn Central merger. The ICC, under Finance Document Number 21989, issued its order on May 6, 1986. (A. 54).

Petitioners filed their Fourth Amended Complaint on February 26, 1987. Respondent filed its Answer on March 27, 1987. On September 28, 1987, Respondent filed its Motion for Summary Judgment.

Respondent moved for summary judgment on three grounds: (1) Petitioners' lawsuit is barred by the six-month limitation period applied in accordance with *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983); (2) Petitioners do not satisfy their burden of establishing a breach of the union's duty of fair representation; (3) Petitioners' Complaint seeks an inappropriate remedy. On July 20, 1988, District Court Judge Sarah Evans Barker granted Respondent's Motion for Summary Judgment on the first of the three

grounds submitted by Respondent. As a result, the District Court found it unnecessary to reach the merits of the second two bases for summary judgment.

Petitioners filed their Notice of Appeal on August 1, 1988. Oral argument took place before the U.S. Court of Appeals for the Seventh Circuit on March 31, 1989. The Court of Appeals issued its decision affirming the District Court opinion on July 7, 1989. On July 20, 1989, Petitioners filed a Petition for Rehearing. The Petition was denied on July 26, 1989. Petitioners' filed their Petition for Writ of Certiorari with this Court on October 25, 1989, with service to Respondent's counsel on October 27, 1989.

B. Statement of Relevant Facts

Petitioners' statement of facts is devoid of citation to the record or appendix. While such citation is not required by Supreme Court Rule 21.1(g), in this case it reflects Petitioners' invention of a new set of "facts" in order to obtain a hearing before this Court. Consequently, Respondent offers this summary of facts before the Court.

As pointed out by U.S. District Judge Barker, the history of this case is long and complicated. (A. 2) The facts and procedural history of the case prior to U.S. District Judge Dillin's entry of judgment on December 18, 1981, are set out in *Zapp v. United Transportation Union*, 727 F.2d 617 (7th Cir. 1984). (A. 33-43). Subsequent developments are outlined in the District Court's decision of July 20, 1988. (A. 7-12)

The Petitioners are all former employees of the IU, an interchange railroad circling Indianapolis. Originally, the IU was a wholly-owned subsidiary of Pennsylvania Railroad but operated as a separate unit. On February 1, 1968, the New York Central Railroad was merged into the Pennsylvania Railroad to become the Penn Central Transportation Company ("Penn Central"). (A. 30).

At that time, the IU became a subsidiary of the Penn Central

by virtue of the change of name of its parent. As a result of the merger, employees of the former Pennsylvania and New York Central Railroads were given a February 1, 1968 seniority date on Penn Central track. (A. 2-3; 34-35). The IU employees were not represented by a union signatory to the employee protection agreements executed in 1966 and 1967 in conjunction with that merger, probably due to the continued independent operation of the IU lines. (A. 2-3; 34-35). Consequently, IU employees did not receive any seniority date on Penn Central track, and kept their own original "date of hire" seniority on IU track. (A. 2). Shortly after the Penn Central merger, UTU became the labor relations representative for the IU employees. (A. 2).

At some point prior to 1971, IU employees became concerned over their exclusion from the 1966 and 1967 agreements. (A. 8-9). According to Petitioners, since 1968 they had been inequitably "bumped" from jobs in the Penn Central system. (A. 9). In 1971, the UTU petitioned the Interstate Commerce Commission ("ICC") seeking a ruling that the merger protective conditions set out in the ICC's earlier order regarding the Penn Central merger (ICC order of April 6, 1966) extended to subsidiaries of the Penn Central such as IU. (A. 9). The ICC issued its ruling on the UTU petition, the "Sixth Supplemental Report," in October of 1974. Petitioners Clyde Rather and Russell Overstreet, then union general chairmen for the IU employees, received copies of the report about three weeks later. (A. 9).

During the pendency of the union petition, Congress created the Consolidated Rail Corporation ("Conrail") to acquire the assets of a number of bankrupt railroads, including the Penn Central. In conjunction with the merger of the bankrupt railroads into Conrail, negotiations aimed at protecting the prior seniority rights of the employees of the railroads were conducted. (A. 9). A meeting of union general chairmen was held in Cleveland to elect a committee of five persons to negotiate seniority agreements on behalf of the employees. Both Rather and Overstreet maintain (despite UTU evidence to the con-

trary) they were not invited to this meeting (and presumably did not attend) despite prior expressions of interest in the matter and inquiries to UTU officials on behalf of the IU employees they represented. (A. 9).

On December 18, 1975, Conrail officials and the five-member UTU committee executed seniority agreements (hereafter the "Seniority Agreements") to govern the seniority rights of the employees of the merged railroads. One agreement applied to trainmen and conductors, the other to engine and service employees. (A. 9). Essentially, the Seniority Agreements provided that all employees with standing on prior seniority district rosters would retain their prior seniority dates throughout the territory of their prior seniority districts. (A. 37-40). They would also gain new rights in other Conrail territories as of the date of their railroad's conveyance to Conrail. (A. 2-3; 10; 34-40). Applied to IU employees, these Seniority Agreements provided for a seniority date in the former IU territory based on their date of hire, and April 1, 1976 (the date of conveyance of the IU Railroad to Conrail) seniority on all non-IU Conrail track. (A. 2-3; 10; 34-40).

No basis exists for Petitioners' claim that IU employees were not discussed in the Seniority Agreements. (Petitioners' Brief, p. 3). Quite to the contrary, the Seniority Agreements identified the IU specifically (A. 16). No enhanced seniority rights were created for IU employees, nor was there any other change in the status quo for IU employees as to Penn Central track. (A. 2; 10; 16; 34-40).

Petitioners' Statement of the Case ignores the events between December 18, 1975 and January 12, 1977 that further placed Petitioners on notice of their status. (Petitioners' Brief, p. 3). Petitioners concede that as of the April 1, 1976 conveyance date, their paychecks came from Conrail. While the precise date is uncertain, IU representatives Rather and Overstreet received copies of the Seniority Agreements no later than September 1, 1976 (not 1977 as Petitioners incorrectly

state at page 8 of their Brief). (A. 4, 5, 10; 16-17)¹ Receipt of the Agreements heightened Overstreet's concern that the IU employees were not receiving equitable seniority treatment. (A. 17).

On approximately August 13, 1976, Plaintiff Rather sent a letter to R.E. Swert, Senior Director of the Conrail Labor Relations Department. In the letter, Rather identified himself as the "Chairman, General Committee of Adjustment," and further identified himself as representing the Indianapolis Union Railway Company employees. In the letter, Rather expressed the opinion that IU employees were entitled to the February 1, 1968 (date of Penn Central merger) seniority date on non-IU Penn Central track.

On September 1, 1976, Mr. Swert sent his response indicating that a copy of the Agreements of December 18, 1975, had been provided to Rather, and that IU employees would receive April 1, 1976 seniority on all non-IU Penn Central track. (A. 21-22). As to the IU employees' position that they were entitled to February 1, 1968 seniority, Swert states:

There is no provision in the Agreement that would provide former IU employees any other seniority on Conrail seniority districts. Finance Docket 21989 [Sixth Supplemental Report] to which you refer does not deal with the question of seniority. *We cannot give favorable consideration to your request.* (Emphasis added).

Petitioners do not deny that Rather received this correspondence. (A. 21).

In January of 1977, the IU facilities were consolidated with those of other track under the jurisdiction of Conrail. (A. 3).

¹ Petitioners attempt to use the statements of Rather and Overstreet, as well as Charles Baker as "admissions" on the part of Respondent UTU as to bad faith, etc. (Petitioners' Brief, p. 4-5). This overlooks the fact that all three individuals have at all times been Plaintiffs in this litigation. (A. 8, 19). Likewise, Mr. Rather was not "General Chairman of said Respondent" but was union general chairman for the IU employees. (A. 9).

Petitioners maintain that with the posting of the new selection order lists and seniority rosters, it became "apparent" to the IU employees that they would receive only an April 1, 1976 seniority date on all non-IU Conrail track, and "that the inequitable seniority treatment they had endured for years would not be changed." (A. 11) As pointed out by the District Court, this candid remark, and other acts by Petitioners, undercut Petitioners' claim of surprise. (A. 2, 3, f.n. 10).

On or about March 22, 1977, attorney Dean Richards, on behalf of Petitioners, directed a letter to A. H. Chessser, International President of the UTU. (A. 11). On March 25, 1977, Chessser responded in part as follows:

I do not agree with your suggestion that the United Transportation Union may not have filled [sic] its duty of fair representation in regard to the seniority rights of former Indianapolis Union Railway employees. I also do not concur with your position that requesting an "administrative meeting" with the undersigned or other union officials constitutes exhaustion of administrative remedies. It is my understanding that timely appeals must be made in accordance with the procedure set forth in the union's constitution before any claim of exhaustion of administrative remedies may be sustained.

In regard to your threat to resort to the courts in this matter I can only tell you that it is our practice to defend ourselves to the fullest extent permitted by law and I can assure you that we will do so in this case.

(A. 11).

For Petitioners to exhaust their intra-union administrative remedies as required by Article 28 of the UTU Constitution (in effect at all times pertinent to this litigation), Petitioners were obligated to file an appeal of Chessser's letter of March 25, 1977, with the General Secretary and Treasurer of the Union no later than June 23, 1977). (A. 24; 6 f.n. 2). Despite Petitioners' protests to the contrary (Petitioners' Brief, p. 4), they possessed

the burden of moving forward with the next step in the Union appeal process. (A. 24). Petitioners failed to file such an appeal. (A. 24). Instead, Petitioners filed this lawsuit on July 12, 1977²/ (A. 12).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioners fail to assert any legitimate, supportable basis for this Court to grant their writ of certiorari consistent with the constraints of Supreme Court Rule 17. The decision below was correctly decided, no split exists between the Circuit Courts of Appeal on any presented question, and the decision rests squarely upon settled federal law.

A. No Error in Courts Below: Petitioners' Complaint Untimely

The allegations in the Fourth Amended Complaint, in essence, claim that the UTU breached its duty of fair representation to the Petitioners in negotiating their seniority rights in the December 18, 1975 Seniority Agreements. (Petitioners' Brief, p. 2).

A cause of action based on negotiation of a collective bargaining agreement accrues, and the limitations period begins to run, when the contract is signed. *United Independent Flight Officers, Inc. v. United Airlines, Inc.*, 756 F.2d 1262, 1273 (7th Cir. 1985) (citing *Local Lodge No. 1424, International Association of Machinists, AFL-CIO v. NLRB*, 362 U.S. 411 (1960)). Thus, the six-month period began to run for the Petitioners on December 18, 1975, the date on which the two collective bargaining agreements in question were signed.

Petitioners claim the Seventh Circuit committed plain error "in failing to follow its own prior decisions." (Petitioners' Brief,

² Not January 12, 1977 as asserted at page 11 of Petitioners' Brief.

p. 10). Leaving aside the question of whether the Seventh Circuit has the right to reverse its own precedent within its own jurisdiction, the law of the Seventh Circuit and the undisputed facts reveal the Seventh Circuit has remained true to its prior decisions in finding Petitioners' lawsuit untimely.

In *Antrim v. Burlington Northern, Inc.*, 847 F.2d 375 (7th Cir. 1988), *cert. den'd* 109 S. Ct. 226 (1988), the Seventh Circuit ruled upon a similar claim against UTU arising from a railroad line merger. The Seventh Circuit affirmed summary judgment in favor of the UTU on the merits of the claim. *Id.* at 379. In so ruling, the Seventh Circuit opined that the claim was probably untimely under *DelCostello* as well. *Id.* at 377. The Seventh Circuit noted that the UTU and the railroad had entered into a settlement agreement in January of 1983, and suit was not filed until late 1984. *Id.* at 377. As the Seventh Circuit put it, "everything of substance was over and done with in January 1983." *Id.* Just so, in this case everything of substance was over and done by December 18, 1975, when UTU and Conrail signed the Seniority Agreements, with Conrail actually taking control of IU track on April 1, 1976. (A. 2-3; 10; 34-40).

In reality, Petitioners knew or reasonably should have known long before December 18, 1975, that their seniority was not equivalent to the former Penn Central employees' seniority. The Penn Central merger went into effect on February 1, 1968. The seniority rights of all former Pennsylvania and New York Central employees were set forth in agreements dated December 21, 1966, and November 16, 1967. (A. 8-9). The IU employees were not represented by the UTU (or its predecessor unions) during the negotiations that produced the 1966 and 1967 agreements and received no seniority rights from those agreements. (A. 2).

According to Petitioners, since 1968 the IU employees had been inequitably "bumped" from jobs within the Penn Central system. (A. 8-9). The record also reflects that IU employees were concerned as to their omission from the 1966 and 1967 Agreements. (A. 9). Indeed, the record indicates that IU

employees felt the effects of their omission from the 1966 and 1967 Agreements long before December 18, 1975. (A. 9).

In any event, the Seniority Agreements, the negotiation of which Petitioners claim constituted a breach of UTU's duty of fair representation, were signed on December 18, 1975. (A. 10). The Petitioners' Complaint was filed July 12, 1977, well beyond the six-month statute of limitations period.

In an effort to salvage their untimely complaint, Petitioners advanced three different theories: (1)the "discovery exception" of *Clift v. UAW*, 818 F.2d 623 (7th Cir. 1987), vacated on other grounds, 109 S.Ct. 830 (1989); (2)equitable tolling/equitable estoppel; (3)exhaustion of intra-union remedies. The Seventh Circuit correctly rejected each of these three theories.

1. Plaintiffs failed to meet their burden of proof to establish qualification under the Clift discovery exception.

In *Clift v. UAW*, 818 F.2d 623, 629 (7th Cir. 1987), the Seventh Circuit stated that plaintiff's claims concerning the consummation of a collective bargaining agreement accrue at the time the document is signed, unless the existence of the new contract could not have been reasonably discovered until later *and* was not actually discovered by the plaintiffs until later. *Id.* at 629. Plaintiffs must meet both prongs of the test, and *each individual plaintiff bears the burden of proof. Id.* Consequently, to avoid summary judgment, each Petitioner must present evidence that he *did not* know of the Seniority Agreements until January 12, 1977, *and* that he could not reasonably have been expected to know of the Agreements prior to that date. *Id.* at 629-630. If Petitioners fail to come forward with such evidence, Respondent is entitled to summary judgment. *Id.*

Thus, the District Court and the Seventh Circuit found that Petitioners should reasonably have discovered the Agreements prior to January 12, 1977 (six months prior to the date of filing

the complaint). This is all that is necessary to defeat Petitioners' discovery exception claim.

In an attempt to evade the Seventh Circuit's established rules on the accrual of the statute of limitations in duty of fair representation cases involving the contesting of a collective bargaining agreement, the Petitioners offer a variety of unsubstantiated and/or irrelevant assertions. (See Petitioners' Brief, pp.10-13). For example, Petitioners spend great energy pontificating on when they learned of the *effects* of the Seniority Agreements. (Petitioners' Brief, pp.10-13). According to Petitioners, this was when the seniority lists were posted in January of 1977. (Petitioners' Brief, pp. 11, 12, 13). Unfortunately for Petitioners, they are answering the wrong question. The law requires the Petitioners to prove that they did not learn of the Agreements themselves, not the effects, until less than six months prior to filing suit, and that they reasonably could not have learned of the existence of the Agreements prior to that time. *Clift*, 818 F.2d at 629.

The undisputed facts before the Court show that Petitioners reasonably *should* have learned of the existence of the Agreements prior to January 12, 1977, and that Petitioners have not met their burden of proving otherwise. As the District Court and the Seventh Circuit pointed out, the submissions of the Petitioners fall short of the standard necessary to enable the Court to make the sort of individualized inquiry contemplated by the Seventh Circuit in *Clift*. (A. 15; 6 f.n. 2).

The Seniority Agreements identify the IU specifically. (A.16). While Petitioners bitterly protest this fact (*see* Petitioners' Brief, pp. 10, 12, 14), there is nothing in the Agreements to indicate any new, affirmative benefit had been negotiated on behalf of the IU employees. (A. 16). Petitioners knew, and had known for many years prior to 1977, that Penn Central employees had a prior right seniority date of February 1, 1968, on Penn Central track. Petitioners also knew, and had known for many years prior to 1977, that, because they were not represented in the Penn Central merger, they had never been granted the

February 1, 1968 seniority date on Penn Central track. (A. 2). They also knew that their only prior right seniority existed on Indianapolis Union Railway track. (A. 16). Thus, Petitioners could determine from Section II of the Seniority Agreements, without any further information, that preservation of each employee's existing prior right seniority would result in the Penn Central employees being treated differently than the Petitioners. (A. 16). Consequently, Petitioners' unsupported assertion that their seniority rights were not decided until January 24, 1977 (Petitioners Brief, p. 14) is directly contradicted by the language of the Seniority Agreements themselves.

The normal practice of the UTU is (and was) to send copies of new collective bargaining agreements to each general chairman who then reproduces copies of the agreements for distribution to the members of his individual jurisdiction. (A. 20-21). In this case, the evidence shows that both Rather and Overstreet received copies of the 1975 Seniority Agreements from the UTU in 1976. (A. 20-21).

In summary, the undisputed facts demonstrate that all of the Petitioners, through the exercise of reasonable diligence, should have discovered the existence and applicability of the December 18, 1975 Seniority Agreements prior to January 12, 1977. The burden is on the Petitioners to satisfy the requirements of the discovery accrual date, and they failed to meet that burden. Consequently, the District Court correctly found, and the Seventh Circuit correctly affirmed, that the Petitioners' cause of action accrued more than six months prior to Petitioners' filing suit on July 12, 1977.

2. There is no ground for equitable tolling or equitable estoppel as to the six month limitation.

Petitioners also assert that "equitable tolling" (fraudulent concealment) and "equitable estoppel" should apply to prevent dismissal of Petitioners' otherwise untimely complaint. (Petitioners' Brief, p. 9). Equitable tolling is available to a plaintiff

where the untimeliness of plaintiff's complaint is attributable to fraudulent concealment on the part of the defendant. *Bonds v. Coca-Cola Company*, 806 F.2d 1324, 1327 (7th Cir. 1986). The related doctrine of equitable estoppel arises where a plaintiff has filed suit in untimely fashion, but has done so based upon its reasonable reliance on the conduct or representations of defendant in forbearing suit. *Bomba v. W.L. Belvidere Inc.*, 579 F.2d 1067, 1071 (7th Cir. 1978).

Petitioners apparently rely on the same alleged facts to support both doctrines. For instance, Petitioners assert IU employees made inquiries to the UTU as to their seniority rights and UTU was slow to respond. (Petitioners' Brief, p.11). Yet, significantly, Petitioners fail to present any evidence that the UTU ever agreed to assist them in obtaining February 1, 1968 seniority as to non-IU Conrail track, nor did UTU give Petitioners any reason to believe that it would support their claim. Further, there is no evidence that the UTU fraudulently concealed the existence or the provisions of the Seniority Agreements. Rather and Overstreet do not deny that they received copies of the Agreements in 1976. (A. 20-21).

According to the unrefuted testimony of Mr. Imel, a UTU official, the normal practice of UTU was to send such agreements to each general chairman (here, Rather and Overstreet) who would then make copies for distribution to the members under his individual jurisdiction. (A. 21).

Petitioners also refer to the Petitioners' inquiries as to the provisions of the Sixth Supplemental Report of the ICC. (Petitioners' Brief, p.10). Yet, as the District Court pointed out, this muddles two distinct inquiries: the existence of the Seniority Agreements on the one hand and the Petitioners' rights, on the other hand, as granted by the Sixth Supplemental Report. (A. 21). As indicated previously, the Seniority Agreements alone preserved whatever prior seniority rights the Petitioners had and granted April 1, 1976, seniority on all other Conrail track. No reasonable ambiguity resides in the provisions of these Agreements, and there is nothing to support a change of the

status quo in favor of IU employees. (A. 21; 16).

In contrast, the UTU and the Petitioners had looked to the Sixth Supplemental Report to define the protective conditions to which the Petitioners were entitled. The impact of that report was the focus of the Petitioners' inquiries. As the Seventh Circuit correctly pointed out in *Zapp I*, the Sixth Supplemental Report and the Merger Protective Conditions had little to do with seniority directly, a matter determined by collective bargaining agreement. (A. 44). The subsequent ICC Order of May 6, 1986 confirmed that its Sixth Supplemental Report did not confer any seniority rights on the Petitioners. (A. 21 f.n. 9).

As the District Court pointed out, even if the Petitioners allege fraudulent concealment of the impact of the Seniority Agreements in light of the Sixth Supplemental Report, the court could not charge the UTU with fraudulent concealment in 1976 for failing to explain an impact that was not known for certain until the ICC's Order of May 6, 1986. (A. 21). In addition, Conrail official R.E. Swert unequivocally informed Mr. Rather by letter on September 1, 1976 that the new Seniority Agreements did not provide the Petitioners with anything more than their prior rights on IU track and April 1, 1976 seniority on all other track. (A. 21).

In summary, Petitioners fail to assert any evidence of fraudulent concealment on the part of UTU. Petitioners' representatives were provided with copies of the Seniority Agreements, and information was provided to them by Conrail as to their lack of seniority rights which the UTU did not contradict. Consequently, equitable tolling is not appropriate in the instant case.

Likewise, Respondent UTU never made any promises to the Petitioners with respect to their seniority rights. Particularly in light of the information that Petitioners were receiving from other sources (e.g. Conrail and the Seniority Agreements themselves), Petitioners could not rightfully nor reasonably rely on UTU's conduct to preserve their right to sue. Conse-

quently, Petitioners cannot invoke equitable estoppel to preserve their untimely lawsuit.

3. Plaintiffs inexcusably failed to exhaust their intra-union remedies.

As a final attempt to salvage their untimely claim, Petitioners assert that the statute of limitations was tolled while Petitioners exhausted their intra-union remedies. (Petitioners' Brief, p. 14). The Seventh Circuit has held that the six month statute of limitations is tolled by pursuit of internal union remedies even when those remedies are ultimately determined to have been futile. *Sosbe v. Delco Electronics Div. of General Motors Corp.*, 830 F.2d 83 (7th Cir. 1987); *Frandsen v. Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Exp. & Station Employees*, 782 F.2d 674 (7th Cir. 1986).

As the District Court pointed out, Petitioners admit they did not exhaust their intra-union remedies (A. 24). On March 22, 1977, Attorney Richards sent a letter to President A.H. Chesser of the UTU complaining of the collective bargaining agreement between UTU and Conrail. (A. 11). Richards made reference to the need to exhaust intra-union remedies and threatened to file suit against the UTU. (A. 11).

President Chesser responded with a letter, dated March 25, 1977, rejecting Richards' claim that the IU employees had been subject to unfair treatment on the part of the UTU. (A. 1i). Yet President Chesser's letter clearly pointed out that the UTU Constitution requires a timely appeal from his determination. (A. 11). That procedure, set forth in Articles 90 and 28 of the UTU Constitution, provides for (and requires) the filing of an appeal within ninety days to the General Secretary and Treasurer of the Union, that appeal to be heard by the Union's Board of Directors. (A. 24). Furthermore, under Article 28 of the Constitution, Petitioners were obligated to exhaust all intra-union remedies by appeal as provided in the Union Constitution before filing suit in the civil courts. (A. 24).

Petitioners assert that this appeal step would have been

futile because the Union's position had "hardened." (Petitioner's Brief, p. 15). Yet, Petitioners fail to offer evidence of such hardening. Petitioners complain that President Chesser did not carry out the preliminary step of assigning an investigating officer prior to making his decision on the complaint. Yet this, if true, was all the more reason for seeking appeal of President Chesser's decision. Failure of the President to properly investigate would have served as a further basis for obtaining an intra-union remedy from the UTU Board of Directors. It does not excuse Petitioners' failure to follow the appeal procedure explicitly set forth in the UTU Constitution.

In conclusion, the Seventh Circuit acted properly in dismissing Petitioners' untimely lawsuit. Petitioners fail to qualify for any recognized exception to, or tolling of, the *DelCostello* six-month statute of limitations. Thus, no error exists in the decisions of the lower courts.

B. No Split Between the Circuits

Petitioners assert a conflict exists between the Seventh Circuit, and the Fourth and Sixth Circuits on the futility exception to the requirement of exhaustion of intra-union remedies as a basis for equitable tolling. (Petitioner's Brief, pp. 14-15). Petitioners cite *Dement v. Richmond, Fredericksburg & Potomac R. Co.*, 845 F.2d 451 (4th Cir. 1988) and *United Transportation Union Local 74 v. Consolidated Rail Corp.*, 881 F.2d 282 (6th Cir. 1989) for the proposition that where there is evidence of "hardening" of the union's position against the plaintiffs or evidence that the grievance procedure has broken down to the employee's disadvantage, an exception exists to the exhaustion requirement. (Petitioner's Brief, p. 15).

Yet this does not represent a split with the Seventh Circuit; that Circuit also recognizes a "futility" exception to the exhaustion requirement. See *Sosbe v. Delco Electronics*, 830 F.2d 83, 86-87 (7th Cir. 1987); *Frandsen v. Brotherhood of Railway, Airline & Steamship Clerks*, 782 F.2d 674, 682 (7th Cir. 1986). Petitioners' claim that the Sixth Circuit recognizes a "conflict

among the circuits" refers only to the issue of whether there is a right to a jury trial in a breach of duty of fair representation case. *United Transportation Union, Local 74*, 881 F.2d at 285. Of course, this is not a question presented by this petition.

Here, the District Court correctly found no evidence of "hardening" or "breakdown" or "futility" as to the final steps of the Union appeal process. (A. 24). Petitioners repeatedly make the claim that Chesser's letter of March 25, 1977, was an invitation to the Petitioners to "sue" the UTU. (Petitioners' Brief, p.14). Quite to the contrary, President Chesser warned Petitioners that they had not exhausted their intra-union remedies and, implicitly, that resort to the courts would be premature. President Chesser's remark that the UTU would defend itself was clearly in response to Attorney Richards' threat and cannot be reasonably construed as contradicting his previous statement that Petitioners must exhaust their intra-union remedies prior to filing any lawsuit. (A. 11). Thus, the instant decision is consistent with those of other Circuits on the futility exception to the intra-union remedy exhaustion requirement.

C. Instant Decision Rests on Settled Federal Law

Petitioners contest Respondent's actions on their behalf in negotiating the collective bargaining agreements of December 18, 1975. Yet, Petitioners' own case law states "when carrying out that duty, however, the UTU was entitled to a 'wide range of reasonableness' in striking the specific terms of the bargain . . ." *Dement v. Richmond, Fredericksburg & Potomac Railroad Co.*, 845 F.2d 451, 457 (4th Cir. 1988). In order to establish a breach of the duty of fair representation, Petitioners must show that UTU's conduct was arbitrary, discriminatory or in bad faith. *Id.* at 458.

Petitioners, despite pursuit of this litigation for twelve years, have failed to present evidence of such arbitrary and capricious conduct on the part of the Respondent. By the same token, Petitioners have failed to produce evidence to justify relief from the *DelCostello* six month statute of limitations and

the accrual date of December 18, 1975.

All undisputed evidence before the Court indicates Petitioners knew, or reasonably should have known, of the existence of the Seniority Agreements prior to January of 1977. Petitioners knew of their lack of seniority rights for many years prior to 1977. There is no evidence that the UTU promised to seek change of the collective bargaining agreements, or to pursue any change in the seniority rights of the IU employees in collective bargaining negotiations. There is no evidence that the UTU misrepresented the Petitioners' seniority rights. In addition, Petitioners failed to exhaust their intra-union remedies, despite an explicit written warning from the UTU President that they should do so. Consequently, no reasonable basis exists for tolling the statute of limitations which began to run on December 18, 1975.

The Supreme Court's *DelCostello* decision recognizes that the six-month statute of limitations requires plaintiffs to be diligent in pursuit of their claims against a union, and that some claims would be barred as a result. Yet, in *DelCostello* this Court affirmed that certainty and prompt resolution are cornerstones of the labor laws of the United States. *DelCostello v. International Brothers of Teamsters*, 462 U.S. 151, 167-171 (1983). In *DelCostello*, the Court stated:

This system, with its heavy emphasis on grievance, arbitration, and the "law of the shop", could easily become unworkable if a decision which has given "meaning and content" to the terms of an agreement, could suddenly be called into question as much as [three] years later.

Id. at 170.

Petitioners' Complaint is actually based on their failure to obtain any seniority rights in the 1966 and 1967 Agreements which led to the February 1, 1968, Penn Central merger. UTU did not represent the Petitioners in 1968 or anytime prior to 1968. The core of Petitioners' Complaint arises from acts which occurred *nine years* prior to the filing of this lawsuit. UTU

never promised Petitioners that it would obtain for Petitioners what Petitioners never had (a February 1, 1968 seniority date on non-IU Penn Central track) and the December 18, 1975 Seniority Agreements merely confirmed that fact. Consequently, Petitioners challenge events and decisions that are distinctly remote in time from the filing of their Complaint. Likewise, the decision turns upon its own facts and, as it stands, is unlikely to affect others beyond the Petitioners.

CONCLUSION

Based on the facts presented by the record, no error exists in decisions of the lower courts. No split exists in the applicable decisions of the U.S. Circuit Courts of Appeal. Finally, no unsettled issue exists requiring the Court's attention. Petitioners' suit was not filed in timely fashion and is thus barred by the six month statute of limitations. To find otherwise would undermine the certainty and prompt resolution of workplace disputes mandated by the *DelCostello* decision.

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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